Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, Local 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, GREG FISHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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78 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by United States District Judge Daniel B. Sparr, as to call for an exercise of the Supreme Court's power of supervision.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

ARGUMENT 17

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988) 24

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 . . . . . 17, 18

Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270 (10th Cir. 1989) . 23

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 19, 25

Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988) rev'd in part on other grounds 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) 24, 28

Casillan v. Regional Transportation District, Nos. 92-1009 and 92-1039 (10th Cir. January 15, 1993) 15

Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985) . 28

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) 22

DeHerrera v. Denver, Nos. 93-1070 and 93-1139 (10th Cir.) 14

Doering v. Union County Board, 857 F.2d 191 (3rd Cir. 1988) . . 26

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) 28

Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 and 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S. Ct. 87 (October 4, 1993) (No. 92-1994) 14

Herzfeld v. Blair, 769 F.2d 645 (10th Cir. 1985) 20

In re Smith, 10 F.3d 723 (10th Cir. 1993) 14

Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) 18

Moore v. United States, 950 F.2d 656 (10th Cir. 1991) 23

Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159 (10th Cir. 1986) 23

Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137 (D.C. Cir. 1986) . 20

Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) 14

Tatum v. Regents of the University of Nebraska-Lincoln, 460 U.S. 1048, 103 S.Ct. 1450, 75 L.Ed.2d 804, 462 U.S. 1117, 103 S.Ct. 3084, 77 L.Ed.2d 1346 (1983) 20

Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) . . . 23

United States v. Berryhill, 880 F.2d

275 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990) . . 15

United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993) 15

United States v. Spedalieri, 910 F.2d 709 (10th Cir. 1990) 15

Van Sickle v. Holloway, 791 F.2d 1431 (10th Cir. 1986) 20

White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990) 23, 24, 25, 27, 28

STATUTES

28 U.S.C. § 455(a) 3, 11, 12, 29

28 U.S.C. § 1254 2

28 U.S.C. § 1291 9

28 U.S.C. § 1331 6

28 U.S.C. § 1343 6

28 U.S.C. § 1927 25

29 U.S.C. § 185 6

42 U.S.C. § 1981 5

42 U.S.C. § 1983 5

42 U.S.C. §§ 2000e et seq. 5

OTHER AUTHORITIES

Amend. 1, U.S. Consti. 6

Amend. 4, U.S. Consti. 6

Amend. 5, U.S. Consti. 6

Amend. 9, U.S. Consti. 6

Amend. 14, U.S. Consti. 6

Fed. R. Civ. P. 11 . . . . . 22, 26

Fed. R. Civ. P. 38 25

Fed. R. Civ. P. 56(f) 7, 9, 18

10th Cir. R. 36.3 . . . . . 2, 15

10th Cir. R. 46.5.2 20

Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit . 15

Fed. R. Civ. P. 11 Advisory Committee Note, 97 F.R.D. 198 (1983) 21

Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845 21

Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901 (1988) 26

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Casillan and his attorney, David L. Smith, hereby petition the Supreme Court of the United States to issue a writ of certiorari to review the orders and judgments entered in this case by the United States Court of Appeals for

the Tenth Circuit on January 15, 1993 and December 14, 1993.

OPINIONS BELOW

Reference is hereby made to the official and unofficial reports of the opinions delivered in this case by the Tenth Circuit. These reports are in the form of unpublished orders and judgments, which under 10th Cir. R. 36.3 have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel, and which are included in the appendix to this petition at pages 1a-39a.

JURISDICTION

The orders and judgments sought to be reviewed were entered on January 15, 1993 and December 14, 1993. 28 U.S.C. §

1254 is the statutory provision believed to confer on the Supreme Court jurisdiction to review these orders and judgments by writ of certiorari. Rehearing en banc of the January 15, 1993 order and judgment was denied by the Tenth Circuit on February 17, 1993. No petition for rehearing was filed with respect to the December 14, 1993 order and judgment.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

Mr. Casillan is an Hispanic/Filipino citizen of the United States who was employed by the Regional Transportation District ("RTD") in Denver, Colorado from November 24, 1974 to November 10, 1989.

On November 6, 1989, Mr. Casillan filed a charge of national origin discrimination against his employer with the United States Equal Employment Opportunity Commission because of a September 12, 1989 incident in which a supervisor by the name of George Stanko falsely accused him of attempting to run down a co-employee in a golf cart. Mr. Stanko and another RTD official, Greg Fisher, suspended Mr. Casillan from his employment and told him never to set foot on RTD property again until he had been examined by a psychiatrist and cleared to return to work. When Mr. Casillan refused to submit to a psychiatric examination, Mr. Fisher terminated him from his employment without first giving him a due process hearing or otherwise following RTD's termination policies and procedures. The acting general manager

of RTD, Richard D. Bauman, and other high-ranking RTD officials subsequently ratified and finalized Mr. Fisher's actions. Amalgamated Transit Union, Local 1001 ("ATU") filed a grievance on Mr. Casillan's behalf, but failed or refused to adequately represent Mr. Casillan in the subsequent grievance and arbitration proceedings. On July 3, 1990, the arbitrator issued a decision rubber-stamping the unconstitutional actions by the RTD and its officials.

On September 27, 1990, Mr. Casillan filed suit in the United States District Court for the District of Colorado charging a conspiracy by and among the RTD, the ATU, and six RTD officials (hereinafter collectively referred to as "respondents") to deprive him of his civil rights under 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act

of 1964, 42 U.S.C. §§ 2000e et seq.; § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.[1] After denying Mr. Casillan's motion to disqualify ATU's attorneys from the case because of a conflict of interest created by their prior representation of him in his grievance and arbitration proceedings, United States District Judge Daniel B. Sparr granted respondents' motions to dismiss and/or for summary judgment and dismissed Mr. Casillan's conspiracy case, but failed to lift the stay on discovery that had been in effect since February 6,

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[1]Jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1343.

1991.[2] Judge Sparr subsequently imposed monetary sanctions of $438.13 against Mr. Casillan's attorney for filing alleged frivolous motions for reconsideration of rulings made by United States Magistrate Judge Hilbert Schauer, but failed to address the merits of Mr. Casillan's

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[2]At a telephone discovery conference on January 29, 1991, Judge Sparr promised Mr. Casillan's attorney that there would be no ruling on respondents' motions to dismiss and/or for summary judgment until there had been an adequate opportunity for discovery. After Judge Sparr subsequently stayed all discovery in the case pending determination of respondents' motions to dismiss and/or for summary judgment, Mr. Casillan filed an affidavit pursuant to Fed. R. Civ. P. 56(f) stating that essential facts were exclusively in the knowledge and control of the respondents; that since discovery had been stayed, he would be unable to present by affidavit facts essential to justify his opposition to respondents' motions to dismiss and/or for summary judgment; and that additional time would be necessary for him to take depositions and conduct other discovery regarding the conspiracy to deprive him of his civil rights. Mr. Casillan's Rule 56(f) affidavit was stricken from the record.

attorney's arguments opposing the imposition of monetary sanctions against him.[3]

On appeal, the Tenth Circuit affirmed Judge Sparr's orders, but failed to address the merits of Mr. Casillan's and his attorney's arguments opposing dismissal of Mr. Casillan's conspiracy case and the imposition of monetary sanctions against Mr. Casillan's

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[3]On August 30, 1991, Magistrate Judge Schauer denied RTD's motion for a protective order on procedural grounds, but refused to address Mr. Casillan's and his attorney's motion to strike the false and defamatory statements made by RTD, its legal counsel (Sally Zack Wheeler), and others in their motion for protective order and supporting affidavits. After Mr. Casillan filed with Judge Sparr a motion for reconsideration of Magistrate Judge Schauer's ruling on this matter, Magistrate Judge Schauer purported to deny the motion for reconsideration and to impose monetary sanctions against Mr. Casillan's attorney for filing an alleged frivolous motion for reconsideration.

attorney.[4] The Tenth Circuit imposed additional monetary sanctions against Mr.

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[4]On appeal, Mr. Casillan argued that Judge Sparr erred in concluding that the allegations made in Mr. Casillan's second amended complaint failed to state claims upon which relief can be granted; that Judge Sparr denied him the opportunity to determine through the discovery process whether the evidence existed to establish a conspiracy; that Judge Sparr erred in denying his motion to disqualify ATU's attorneys; that Judge Sparr erred in dismissing his second amended complaint without addressing the arguments made in his motions for reconsideration of Magistrate Judge Schauer's August 30, 1991 and November 29, 1991 orders; and that Judge Sparr erred in denying his motion for reconsideration of Judge Sparr's April 5, 1991 order striking his Rule 56(f) affidavit. Mr. Casillan's attorney argued that Judge Sparr abused his discretion by imposing monetary sanctions against him without addressing the arguments made in Mr. Casillan's motions for reconsideration of Magistrate Judge Schauer's August 30, 1991 and November 29, 1991 orders, and without addressing the arguments made in Mr. Casillan's attorney's objection to the "authenticity or reasonableness" of the monetary sanctions imposed against him by Magistrate Judge Schauer in Magistrate Judge Schauer's November 29, 1991 order. Jurisdiction of the Tenth Circuit in both appeals was based on 28 U.S.C. § 1291.

Casillan's attorney for filing and pursuing alleged frivolous appeals of Judge Sparr's orders, but failed to give Mr. Casillan's attorney notice that sanctions were being considered or a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed.[5] The case was then remanded to Judge Sparr "for a determination of reasonable attorney fees for each

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[5]The respondents failed to request the Tenth Circuit to impose attorney fees and costs against Mr. Casillan's attorney for filing and pursuing an alleged frivolous appeal of Judge Sparr's dismissal of Mr. Casillan's case. Furthermore, prior to imposing monetary sanctions, the Tenth Circuit failed to issue an order to show cause why sanctions should not be imposed against Mr. Casillan's attorney for filing and pursuing alleged frivolous appeals of Judge Sparr's orders, and failed to provide Mr. Casillan's attorney with a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed. Mr. Casillan's attorney was therefore deprived of his due process rights.

defendant for defending this appeal." Mr. Casillan's and his attorney's motions to disqualify the Tenth Circuit hearing panel on the ground of judicial bias and for rehearing en banc were denied.[6]

On remand, Judge Sparr determined that attorney fees of $14,481.50 were reasonable for defending Mr. Casillan's and his attorney's appeals to the Tenth Circuit, and assessed this amount against

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[6]In his motion to disqualify, Mr. Casillan argued that the facts of the case had been misstated; that the transcript of the evidentiary hearing held before Magistrate Judge Schauer on February 13, 1991 had been ignored; that there had been a refusal to exercise supervisory authority over Judge Sparr's illegal actions; and that there had been an abuse of discretion by ruling that Mr. Casillan's attorney's arguments in support of his contentions on the rulings relating to Mr. Casillan's motions for reconsideration were frivolous. Mr. Casillan argued that under these circumstances, the impartiality of the Tenth Circuit hearing panel that rendered the opinion might reasonably be questioned under 28 U.S.C. § 455(a).

Mr. Casillan's attorney and in favor of respondents' attorneys, but failed to address the merits of Mr. Casillan's attorney's arguments opposing the proposed monetary sanctions.[7] Despite the fact that Mr. Casillan's attorney advised Judge Sparr that he was financially unable to pay monetary sanctions or to post a cost bond, he was ordered to post a cost bond of $1,150.00 pending appeal to the Tenth Circuit, and was ordered to show cause why he should

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[7]In addition to denying Mr. Casillan's and his attorney's motion to disqualify Judge Sparr from the case pursuant to 28 U.S.C. § 455(a), Judge Sparr denied their motion for monetary sanctions against respondents' attorneys for requesting attorney fees and costs for defending Mr. Casillan's case in the District Court. Since the case was remanded to Judge Sparr "for a determination of reasonable attorney fees for each defendant for defending this appeal," these requests clearly violated the mandate of the Tenth Circuit's January 15, 1993 order and judgment.

not be held in contempt for failing to obey the order to pay attorney fees of $14,481.50 to respondents' attorneys. This contempt proceeding is still pending before Judge Sparr.

On December 14, 1993, the Tenth Circuit affirmed Judge Sparr's assessment of attorney fees of $14,481.50 against Mr. Casillan's attorney, but failed to address the merits of Mr. Casillan's attorney's arguments opposing the imposition of monetary sanctions against him. The Tenth Circuit considered the fact that "Mr. Smith has been sanctioned in the past and is currently the subject of a stringent disciplinary order issued by another panel of this court," but failed to explain why Mr. Casillan's

attorney is being subjected to double punishment for the same conduct.[8]

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[8]The referenced disciplinary order was issued by a three-judge disciplinary panel of the Tenth Circuit on November 29, 1993, and suspended Mr. Casillan's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit or the District Court are paid. In re Smith, 10 F.3d 723 (10th Cir. 1993). Mr. Casillan's attorney may apply for reinstatement to the Tenth Circuit Bar "when he can demonstrate that each sanction order of this court or the district court has been satisfied." Id. At the present time, more than $50,000.00 in monetary sanctions have been imposed against Mr. Casillan's attorney by the Tenth Circuit and the District Court, and investigations or proceedings for reciprocal discipline have been begun by the United States Court of Appeals for the Federal Circuit, the United States District Court for the District of Colorado and the Colorado Supreme Court.

As grounds for indefinitely suspending Mr. Casillan's attorney from the practice of law in the Tenth Circuit, the disciplinary panel found and concluded that he had filed "frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381

(10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993) (No. 92-1994) and . . . in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993)." Id. However, the disciplinary panel refused to examine the issue of whether the appeals in the referenced cases were frivolous, stating that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court," citing "United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990)." The disciplinary panel thus ignored 10th Cir. R. 36.3, which states that unpublished orders and judgments have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

Before indefinitely suspending Mr. Casillan's attorney from the practice of law in the Tenth Circuit, the disciplinary panel denied his request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to

the charges being brought against him by the disciplinary panel. In that request, Mr. Casillan's attorney said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith] has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the result of the disciplinary panel's denial of an evidentiary hearing to Mr. Casillan's attorney after a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the referenced cases were frivolous, and was unable to present the financial information necessary to show that he is financially unable to pay more than $50,000.00 in sanctions imposed against him by the Tenth Circuit and the District Court.

The disciplinary panel's suspension order is the subject of a separate

ARGUMENT

On the basis of the foregoing statement of the case, Mr. Casillan was illegally deprived of an opportunity for discovery before Judge Sparr dismissed his suit charging a conspiracy to deprive him of his civil rights. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

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petition for a writ of certiorari filed with the Supreme Court on March 31, 1994, arguing that an attorney may not be disciplined by a circuit court based on the attorney's challenge to that circuit court's view of its interlocutory jurisdiction which is in conflict with that of other circuits; that an attorney may not be suspended by a circuit court until the attorney pays all monetary sanctions assessed against him or her, where the attorney is financially unable to pay those sanctions; and that a circuit court's denial of an evidentiary hearing prior to suspending an attorney constitutes an abuse of discretion or a denial of due process. Since this petition and the petition in the present case are based on many of the same facts and arguments, and request much of the same relief, Mr. Casillan and his attorney request consolidation of the petitions for all purposes.

S.Ct. 2505, 91 L.Ed.2d 202 (1986);[9] Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979).[10] Mr. Casillan's attorney

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[9]In Anderson, the Supreme Court said:

> This requirement [i.e., the requirement that when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial'"] in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

Id. at 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5, 91 L.Ed.2d at 213 n. 5.

[10]In Lessman, the Tenth Circuit said:

> In many cases of conspiracy essential information can only be produced through discovery, and the parties should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they think may exist actually does.

was deprived of his due process rights to notice that sanctions were being considered and a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed against him. Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).[11] Judge Sparr and the

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Id. at 611-12.

[11]In Braley, the Tenth Circuit said:

> But the determination to impose sanctions on an attorney for bringing a frivolous appeal involves another step--placing the blame. And there remains for consideration the defenses which might absolve the lawyer of the responsibility for taking the frivolous appeal. This, we hold, justifies and requires notice and opportunity to be heard before final judgment. At this point the court has two options: to decide the matter itself or to remand to allow the district court to resolve the entire issue. An argument in favor of remand is that a hearing generally will be necessary to determine the amount of the costs to be paid, and trial courts are better equipped for hearing conflicting evidence. But

usually the appellate court that made the frivolousness determination will want to hear for itself the excuses, if any, offered by the lawyer to avoid or to mitigate the sanctions. In such a case, if a party has already made a motion or request in its brief that sanctions be imposed, and identified the party or counsel it wants to be sanctioned, the notice requirements are satisfied, so long as the court gives the person against whom sanctions are requested an opportunity to file a brief or otherwise be heard before imposing sanctions. See, e.g., Herzfeld, 769 F.2d at 647. On those occasions when the court intends to consider such sanctions sua sponte, due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response. See Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986); see also Reliance, 792 F.2d at 1139; cf. 10th Cir. 46.5.2 (specifying procedure for imposition of monetary sanctions on court-appointed counsel).

At the appellate level, the right to respond does not require an adversarial, evidentiary hearing. See, e.g., Tatum v. Regents of the University of Nebraska-Lincoln, 460 U.S. 1048, 103 S.Ct. 1450, 75

L.Ed.2d 804, 462 U.S. 1117, 103 S.Ct. 3084, 77 L.Ed.2d 1346 (1983); see generally Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845, 875-77. Even at the trial court level, the sanction inquiry may properly be limited to the record in most instances. See Fed. R. Civ. P. 11 Advisory Committee Note, 97 F.R.D. 198, 200-01 (1983). If the court has acted sua sponte, the prevailing party should be notified that it may, but need not, participate in the proceedings to determine whether sanctions should be imposed.

After considering any excuses the attorney offers to justify his or her actions, the court generally will enter a final order rejecting or imposing sanctions and, if imposing, either establish the amount itself or remand to the district court for that determination. If fact issues arise from the response, affecting either the amount or whether sanctions should be imposed at all, the appellate court may delegate to the district court the task of resolving those issues. Although the panel in the case before us intended to allow the district court to lift sanctions entirely if the district court found that justified, the order did not make that clear. The panel order appears to impose sanctions sua sponte without giving Alexander

Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney without addressing his arguments opposing the dismissal of Mr. Casillan's conspiracy case and the imposition of monetary sanctions against him. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).[12] Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's

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> notice and an opportunity to respond.

Id. at 1514-15.

[12]In Cooter & Gell, the Supreme Court said:

> [A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Id. at 110 S.Ct. 2461.

attorney for filing motions for reconsideration of Magistrate Judge Schauer's rulings to Judge Sparr that he was required to file in order to preserve Mr. Casillan's right to appeal these rulings to the Tenth Circuit. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); Moore v. United States, 950 F.2d 656 (10th Cir. 1991); Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270 (10th Cir. 1989); Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159 (10th Cir. 1986). Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney for filing appeals of Judge Sparr's orders that presented colorable claims based on the facts and law at issue and were therefore not frivolous. White v. General Motors Corp., Inc., 908 F.2d 675

(10th Cir. 1990).[13] Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney for conduct that manifested neither an

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[13]In White, the Tenth Circuit said:

> This circuit has adopted the view that an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions. Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988). A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances. Id. In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim. See Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988)(focus on whether an objectively reasonable basis for claim 'was demonstrated') rev'd in part on other grounds ___ U.S. ___, 110 S.Ct. 456, 107 L.Ed.2d 438 (1988).

Id. at 680.

intentional nor a reckless disregard of his duties to Judge Sparr or the Tenth Circuit.[14] Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney in an amount greatly in excess of the minimum that would adequately serve to deter any undesirable behavior.[15] Judge Sparr and

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[14]In Braley, the Tenth Circuit said:

> We believe the proper standard under either Rule 38 or § 1927 is that excess costs, expenses, or attorney's fees are imposable against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.

Id. at 1512.

[15]In White, the Tenth Circuit said:

> We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:

. . .

> 2. Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. Doering, 857 F.2d at 196 & n. 4. We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the "minimum that will serve to adequately deter the undesirable behavior." Id. at 194 (quoting Eastway, 637 F.Supp. at 565) (emphasis in Circuit opinion); see also Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901, 912-14 (1988) (stressing importance of optimal rather than maximum deterrence in the imposition of Rule 11 sanctions). Thus, the limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer. E.g., Doering, 857 F.2d at 195-96.

Id. at 684.

the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney in an amount that creates a substantial risk of chilling federal civil rights litigation.[16] Judge Sparr and the Tenth

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[16]In White, the Tenth Circuit said:

> We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:
>
> . . .
>
> 4. Other factors. In addition, the court may consider factors [in assessing sanctions] such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See ABA Standards at 236-37.

Id. at 685.

Circuit imposed monetary sanctions against Mr. Casillan's attorney without making specific findings regarding who bears the fault, if any, for the various actions alleged to warrant sanctions.[17] Judge Sparr and the Tenth Circuit imposed

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[17]In White, the Tenth Circuit said:

> Sanctions must be appropriate in amount and levied upon the person responsible for the violation. Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985). We agree with those circuits that have expressed the view that the sanctioning of a party requires specific findings that the party was aware of the wrongdoing. Calloway, 854 F.2d at 1474-75; Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc). In the instant case, the trial court appears to have assessed joint and several liability without considering relative fault. . . . Therefore, on remand the court should make more specific findings regarding who bears the fault for the various actions warranting sanctions.

Id. at 685.

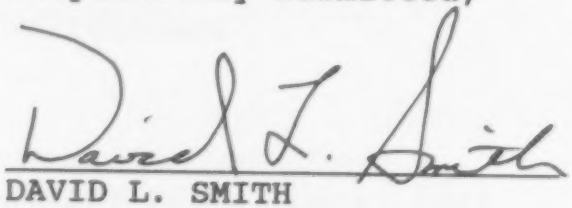
monetary sanctions against Mr. Casillan's attorney in an amount that he is financially unable to pay. The Tenth Circuit subjected Mr. Casillan's attorney to double punishment for the same conduct by suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. Under all the circumstances of the case, Judge Sparr's and the Tenth Circuit hearing panel's impartiality might reasonably be questioned, and they therefore abused their discretion by refusing to disqualify themselves from the case pursuant to 28 U.S.C. § 455(a).

CONCLUSION

The United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned

such a departure by United States District Judge Daniel B. Sparr, as to call for an exercise of the Supreme Court's power of supervision.

Respectfully submitted,



DAVID L. SMITH

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Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, Local 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, GREG FISHER,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX TO APPENDIX

Document	Page
Order and Judgment (10th Cir. December 14, 1993) . . .	1a
Order and Judgment (10th Cir. January 15, 1993) . . .	6a

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
No. 93-1158
(D.C. No. 90-S-1722)
(D. Colo.)

JOHN CASILLAN,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT; AMALGAMATED TRANSIT UNION, LOCAL 1001; MICHAEL GARCIA; RICHARD BAUMAN; ROBERT GARSIDE; ED RHATICAN; PETE PEREA; BERNIE SNYDER; GEORGE STANKO, and GREGG FISHER,

Defendants-Appellees.

DAVID L. SMITH,

Attorney-Appellant.

ORDER AND JUDGMENT*

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before ANDERSON and EBEL, Circuit Judges, and WINDER,** District Judge.

**Honorable David K. Winder, Chief Judge, United States District Court for the District of Utah, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This proceeding arises out of an unsuccessful civil rights action litigated by appellant David L. Smith as counsel for plaintiff John Casillan. On two prior appeals, this court affirmed the district court's dismissal of the action and its imposition of sanctions. An en banc petition for rehearing and

motion to disqualify the author of the adverse order and judgment were also denied. As a sanction for pursuing the frivolous appeals, this court held plaintiff's counsel accountable for attorneys' fees incurred by the opposing parties, and remanded the matter to the district court for a determination of the appropriate amount. On remand, the district court awarded $4,525.00, $3,269.00 and $6,687.50 to the attorneys representing three sets of defendants-appellees. This appeal followed.

Having reviewed the briefs and materials submitted by the parties, we conclude that most of the issues raised by Mr. Smith are plainly lacking in merit and warrant no further comment. The remaining matters consist of conclusory challenges to the hours and hourly rate deemed reasonable by the district court

for computing defense counsel's fees. We review the latter solely for an abuse of discretion, Aguinaga v. United Food & Commercial Workers International Union, 993 F.2d 1480, 1481 (10th Cir. 1993), of which we find no indication here.

Appellees have requested the imposition of an appellate sanction against Mr. Smith for pursing a frivolous appeal. Unlike a number of other matters brought before this court by Mr. Smith,[1] this appeal, while meritless, is not in our opinion so bereft of legal or factual bases as to warrant sanctions.

The order of the United States District Court for the District of Colorado is AFFIRMED. Amalgamated

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[1] We note that Mr. Smith has been sanctioned in the past and is currently the subject of a stringent disciplinary order issued by another panel of this court.

Transit Union's motion to adopt the answer brief filed by its co-appellees is GRANTED, and the Regional Transportation District's motions to supplement its supplemental appendix with a full hearing transcript and to compel Mr. Smith to order and pay for the same is DENIED as moot in light of our disposition of the appeal.

Entered for the Court

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
Nos. 92-1009 and 92-1039
(D.C. No. 90-S-1722)
(Dist. Colo.)

JOHN CASILLAN,

Plaintiff-Appellant,

v.

REGIONAL TRANSPORTATION DISTRICT; AMALGAMATED TRANSIT UNION, Local 1001; MICHAEL GARCIA; RICHARD BAUMAN; ROBERT GARSIDE; ED RHATICAN; PETE PEREA; BERNIE SNYDER; GEORGE STANKO, and GREGG FISHER,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before McKAY, SETH and MOORE, Circuit Judges

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(e); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiff John Casillan appeals the district court's dismissal of his civil rights complaint against the Regional Transportation District (RTD), Amalgamated Transit Union (ATU), and various named individual defendants. In a separate case, plaintiff's counsel also appeals the imposition of sanctions against him. We combine both cases for disposition and affirm.

This case arises out of a series of work-related conflicts between plaintiff, three of his four co-workers and

defendant Stanko, which resulted in plaintiff's termination for refusal to undergo psychiatric evaluation. Plaintiff is a United States citizen of Hispanic/Filipino origin. He was employed as a facilities maintenance technician by defendant RTD for fifteen years, spanning from November 24, 1974, until his termination on November 10, 1989. At the time of his termination, plaintiff and his co-workers were supervised by defendant Stanko.

The ongoing tension between plaintiff and three co-workers, which included a fist fight between plaintiff and a co-worker in 1987, and an alleged attempt by plaintiff to run over another coworker with a golf cart on September 12, 1989, are extensively documented in an arbitrator's decision made a part of the record before us. Because of the

golf cart incident, plaintiff was suspended for two days and issued disciplinary notices for conduct unbecoming an employee and use or threat of force. According to defendant Stanko, when plaintiff was suspended, plaintiff made inappropriate comments about Mr. Stanko's health and threatened to have him fired. Plaintiff subsequently asked for a medical pass and not return to work until October 16, 1989.[1]

Between October 16 and 19, plaintiff allegedly threatened to "get" one of his co-workers, accused defendant Stanko of setting him up, and attempted to frighten another co-worker by driving his van toward the man. On October 19, 1989, the

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[1] During his time off, plaintiff maintains he filed complaints with the EEOC and Colorado Civil Rights Commission, alleging national origin discrimination. The existence and/or outcome of these complaints is unknown.

three co-workers told defendant Stanko they were unwilling to work with plaintiff because they were afraid for their own safety, given plaintiff's hostile actions and their on-the-job exposure to high voltage. Defendant Stanko sent the men back to work and contacted defendant Fisher, the senior labor relations representative.

After meeting with plaintiff, defendant Stanko, plaintiff's co-workers, and others, defendant Fisher asked plaintiff to undergo a psychiatric evaluation. Plaintiff refused. Mr. Fisher then sent plaintiff home on paid sick leave pending psychiatric evaluation and threatened to terminate plaintiff's sick leave benefits if plaintiff failed to undergo evaluation.

Plaintiff's sick leave benefits expired on October 24 but were extended

through November 10 by defendant Fisher, who again asked plaintiff to reconsider psychiatric evaluation. On November 6, plaintiff filed a national origin discrimination complaint with the EEOC, alleging he had been falsely accused (by defendant Stanko) of attempting to run down a co-worker in a golf cart.[2]

On November 8, defendant Fisher informed plaintiff he would be terminated if he continued to refuse evaluation. Plaintiff was terminated on November 10 due to "continuing voluntary unavailability for work" and given full benefits and pay through that date.

Because plaintiff was a member of defendant ATU and his employment was governed by a collective bargaining

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[2] Once again, the outcome of the EEOC complaint is unknown.

agreement between ATU and RTD, plaintiff first challenged his termination in a grievance/arbitration proceeding in which he was represented by defendant ATU. At the July 1990 arbitration hearing, plaintiff testified at length about the harassment he allegedly had experienced at the hands of his co-workers. Plaintiff claimed his co-workers instigated the various encounters and conflicts at issue. Plaintiff also accused defendant Stanko of singling him out for less desirable jobs. Finally, plaintiff testified he had filed EEOC charges on a number of occasions.

In response, RTD contended it had the right to require plaintiff to undergo psychiatric evaluation under the Management Rights and Sick Leave provisions of the Collective Bargaining Agreement. RTD also introduced evidence

about its past practice of requiring medical or psychiatric evaluations where warranted, noting that defendant ATU (which at that time represented plaintiff) could select a second doctor if it disagreed with the results of the initial psychiatric exam. In the alternative, RTD suggested plaintiff could be evaluated under the Employee Assistance Program, a program for employees who represent less of an immediate threat.

The arbitrator concluded plaintiff's termination differed "dramatically" from a normal discharge case in two important respects. First, plaintiff's termination, in effect constituted an indefinite suspension because RTD had agreed to put plaintiff back to work at the facility of his choice if plaintiff agreed to a psychiatric evaluation and

the results were favorable. Second, RTD had a contractual right to require plaintiff to undergo medical examination, (including psychiatric evaluation, which the arbitrator found indistinguishable from physical examination) based on the provisions of the collective bargaining agreement and past practice. The arbitrator determined RTD had a reasonable basis for requiring the evaluation, given the number of complaints against plaintiff and RTD's need to take action to solve the obvious problems between plaintiff and his co-workers. Finding he could "only commend" RTD for the manner in which it handled plaintiff's case, the arbitrator ordered ATU and RTD to establish an "appropriate method" for psychiatric evaluation.

Despite the arbitrator's findings, plaintiff never submitted to psychiatric

evaluation. Instead, on September 27, 1990, plaintiff filed the instant action against RTD, ATU, and several individual defendants,[3] alleging violation of his civil rights under 42 U.S.C. § 1981 and 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000; § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. On December 10, 1991, after more than a year of procedural skirmishes and two ineffectual amendments to plaintiff's original complaint, the district court

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[3] In addition to defendants Stanko and Fisher, plaintiff sued six members of RTD management. With the exception of defendant Bauman, who was RTD acting general manager when plaintiff was terminated, it is unclear from plaintiff's complaint or the briefs submitted on appeal exactly what positions the other named defendants held or in what capacity they were acting when they allegedly violated plaintiff's civil rights.

granted defendants' Fed. R. Civ. P. 12(b)(6) motions to dismiss plaintiff's complaint for failure to state claims upon which relief could be granted.

Plaintiff argues that under Lessman v. McCormick, 591 F.2d 605, 611 (10th Cir. 1979) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)), "and the legal authorities cited therein, "he is not required to set out in detail the facts upon which he bases his claim." To the contrary, plaintiff maintains his "short and plain, statement of claims gave defendants fair notice of the basis for charges against them, thus satisfying Lessman's loose pleading requirements. Plaintiff argues the district court erred in concluding otherwise or, alternately, in not giving him the opportunity to amend the complaint again under Fed. R. Civ. P. 15(a).

The sufficiency of a complaint is a question of law which this court reviews de novo, applying the same scrutiny, as the trial court. Ayala v. Joy Mfg., Co., 877 F.2d 846, 847 (10th Cir. 1989) (quoting Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986) (citations omitted)). Thus, in considering whether the district court erred in dismissing plaintiff's complaint, "[all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984) (citation omitted) (emphasis added). Dismissal is proper "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d

1111, 1115 (10th Cir. 1991) (citation omitted).

Plaintiff's reliance upon Lessman is misplaced because the case is distinguishable in two important respects. First, though the complaint in Lessman failed to allege plaintiff "was unlawfully deprived of her money or property," the complaint did state specific facts supporting a claim of false arrest and false imprisonment under color of state law. Lessman, 591 F.2d at 609. Second, Lessman's false imprisonment claim, which asserted a violation of the constitutional right to be free from bodily restraint, is a recognized § 1983 cause of action.

In contrast, Mr. Casillan's complaint is devoid of any facts from which this court could surmise that a constitutionally protected liberty or

property right was violated. Based upon plaintiff's refusal to submit to psychiatric examination, the complaint identifies only the "reasonable expectation of privacy with respect to his own thoughts and mental processes" as a constitutional predicate for his action.

Plaintiff has cited no cases in which such a right is recognized, especially where an employment agreement specifically grants an employer the right to request such an examination. Here, the contract governing plaintiff's employment explicitly stated, "the Employer [RTD] reserves the right to request that the employee submit to an examination by a medical doctor of the Employer's choosing and at the Employer's expense."

Plaintiff's complaint, moreover, is full of unsubstantiated, generalized

factual allegations which do not give defendants any notice of the grounds upon which plaintiff's claims are based. The most glaring example is plaintiff's repeated charge that defendant ATU "aided, abetted and participated in" the deprivation of his constitutional rights. Nowhere does the complaint state what specific actions defendant ATU supposedly took to deprive plaintiff of constitutionally protected rights. Only in plaintiff's appeal brief do we discover that defendant ATU allegedly "failed to adequately represent him in the grievance and arbitration process." This contention was not raised in the district court. In short, plaintiff has confused vague conclusory generalizations for the statement of facts necessary to state a claim.

As the district court noted in its comprehensive, wellreasoned order dismissing plaintiff's complaint, all the claims contained in the complaint are disposable due to their legal inadequacy. For instance, plaintiff's § 1983 claim fails to satisfy either of the statute's two elements because the complaint does not explain how defendants acted under color of law or which of plaintiff's constitutionally protected rights were violated. Because the elements of a conspiracy claim under § 1983 are the same as those for a regular § 1983 claim, Norton v. Liddel, 620 F.2d 1375, 1378-79 (10th Cir. 1980), plaintiff's § 1983 conspiracy claim is plagued by the same problems. Plaintiff's § 1981 claim is without merit because § 1981 does not apply to the kind of on-the-job

deprivation which plaintiff alleges.[4] Plaintiff's Title VII claim also fails because plaintiff alleges no facts to support a causal connection between his EEOC claims and his termination or retaliatory motives on the part of named defendants. Finally, plaintiff's privacy, property, and liberty claims under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments are not

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[4] As the Supreme Court noted in Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989), "the right to make contracts [under § 1981] does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including . . . imposition of discriminatory working conditions" or harassment by a supervisor. Nor does the right to enforce contracts "extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." Id. at 177-78. Here, the arbitration hearing and instant case illustrate that no defendant has impaired plaintiff's right of access to legal process."

actionable because the complaint fails to state specific constitutional rights which were violated or factual support for those claims. The one right enumerated by plaintiff, the "reasonable expectation of privacy with respect to his own thoughts and mental processes," is not of constitutional import.[5]

Thus, although "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim,"[6] clearly the presumption is not without limits.

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[5] "The constitutional right of privacy is not to be equated with the common law right recognized by state tort law . . . . [O]nly the most intimate phases of personal life have been held to be constitutionally protected." McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.), cert. denied, 429 U.S. 855 (1976) (citations omitted).

[6] Morgan, 792 F.2d at 978 (quoting Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)).

As we stated in Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977) (citations omitted), "allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim."

Plaintiff had three opportunities to file a complaint containing facts sufficient to support his claims. Each of his amended complaints, however, was virtually identical to the original complaint -- devoid of sufficient facts and overly replete with conclusory allegations. Under Fed. R. Civ. P. 15(a), plaintiff was entitled to amend his complaint "once as a matter of course." The district court generously allowed plaintiff to amend a second time, but plaintiff failed to take advantage of the opportunity to tighten his legal

arguments or present facts supporting his claims. Allowing plaintiff to amend yet again would serve no legitimate purpose.

Plaintiff claims the district court's failure to lift a stay of discovery[7] before dismissing his complaint deprived him of "the opportunity to determine through the discovery process whether the evidence existed to establish a conspiracy." To support his argument, plaintiff again cites Lessman, 591 F.2d at 611, this time for the proposition that "parties should not be thrown out of court before being given an opportunity through . . . [discovery] to ascertain whether the linkage they think may exist actually does."

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[7] Discovery was stayed on March 29, 1991, pending evidentiary hearing on and resolution of plaintiff's motion to disqualify defendant ATU's counsel.

As a general rule, "[d]iscovery rulings are within the broad discretion of the trial court." Willner v. Budig, 848 F.2d 1032, 1035-36 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989) (citation omitted); Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990) (citation omitted). "[A] trial court's decision [on discovery matters] will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986).

Plaintiff's conspiracy claim fails to state the specific conspiratorial actions allegedly taken by defendants or the particular constitutional rights allegedly violated by those actions.

Indeed, in the same conclusory fashion which plagues the entire complaint, paragraph 1 merely alleges defendants "have engaged in a conspiracy with each other and with unknown third persons for the purpose of depriving, either directly or indirectly, the Plaintiff of his rights . . . ." Paragraph 2 proceeds along a similarly vague course, only stating that "[o]ne or more persons engaged in the conspiracy did, or caused to be done, an act or acts in furtherance of the object of such conspiracy [i.e., plaintiff's termination], whereby the Plaintiff was injured in his person or property." Plaintiff does not assert what act or acts were committed or by whom, nor does he assert which

constitutional rights were violated as a consequence of concerted action.[8]

Plaintiff's reliance on Lessman for the right, to discovery is misplaced for two reasons. First, Lessman involved conspiracy charges under § 1985, not § 1983. Arguably, Lessman's observation regarding the need for discovery in conspiracy cases[9] is confined to § 1985 conspiracy claims, given that statute's stringent intent/motive requirement.

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[8] Moreover, any such claim could not lie against either RTD or ATU because the doctrine of respondeat superior does not apply to § 1983 claims. Monell v. Dept. of Social Servs., 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694.

[9] Specifically, Lessman, 591 F.2d at 611, stated that "[i]n many cases of conspiracy essential information can only be produced through discovery."

Second, Lessman does not mandate discovery whenever a plaintiff alleges conspiracy. Indeed, in Lessman we affirmed the dismissal of the plaintiff's conspiracy claim, finding the plaintiff failed to show she was the object of a class-based invidiously discriminatory animus." Id. at 608.

Thus, although plaintiff claims he should have been allowed to conduct discovery and proceed with his conspiracy claim, he was not entitled to discovery as a matter of law before the district court ruled on defendants, motions to dismiss. One need only examine plaintiff's fact-less complaint to understand the uselessness of further discovery. The district court's dismissal of plaintiff's complaint without discovery was entirely appropriate.

These conclusions render moot the remaining issues raised in Case 92-1009. We have, nonetheless, reviewed those issues and find them frivolous. Disqualification of ATU's counsel was not required because counsel had no previous attorney-client relationship with plaintiff. Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986). The district court did not err by dismissing the complaint without ruling on plaintiff's motions for reconsideration. The first motion was filed notwithstanding the court had ruled in plaintiff's favor.[10] Plaintiff's

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[10] Specifically, plaintiff's counsel argued that the magistrate's order was clearly erroneous and contrary to law because it "deprived Plaintiff's counsel of the opportunity to expunge the

(continued...)

second motion to reconsider stated the magistrate "was without legal authority" to impose sanctions because under Local Rule 602 C of the United States District Court for the District of Colorado only the district court could do so. The second motion also challenged the granting of defendant RTD's motion for protective order on the grounds that RTD "failed to meet its initial burden" of proving its personnel files were privileged and plaintiff was denied the opportunity to demonstrate the relevancy of the files to his claims. Plaintiff's third motion to reconsider challenged the district court's April 5, 1991 order striking his Rule 56(f) affidavit because he should have been allowed to respond to

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[10](...continued)
record of false and defamatory statements" allegedly made by defendant RTD and its counsel.

defendants, motions for summary judgment/dismissal under Rule 56(e) and file a Rule 56(f) affidavit. Plaintiff's arguments in support of his contentions on these rulings are frivolous.

Plaintiff argues the district court erred in adopting the order of the magistrate judge granting defendant RTD's motion for protective order and imposed sanctions against plaintiff's counsel for filing an "unwarranted and frivolous" motion to reconsider. The sanctioned motion is the first motion previously discussed in which plaintiff contended the magistrate judge's order was clearly erroneous and contrary to law, even though the magistrate judge ruled in plaintiff's favor. In the order awarding attorney fees, the magistrate judge noted that fees were justified on two grounds: "Not only did the court rule in

plaintiff's favor because it agreed with plaintiff that defendant failed to attach supporting documentation, but plaintiff has failed to cite any authority in support of his assertion that the court abused its discretion." On appeal, plaintiff again maintains the magistrate judge's order imposing fees was clearly erroneous and contrary to law and the district court erred in reinstating fees without ever ruling on the merits of plaintiff's motion for reconsideration.

In a joint answer brief, defendants argue that there was no factual basis for plaintiff's motion to reconsider. Rather, "[i]f plaintiff's counsel had reasonably investigated, he would have read the August 30, 1991 order and found it to be in his favor." Moreover, if he had reasonably investigated the law "he

would not have found any authority in support of his positions in the motion."

The standard of review for sanctions or award of attorney fees is whether the district court abused its discretion. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992) (citations omitted); Smith v. Freeman, 921 F.2d 1120, 1122 (10th Cir. 1990) (citations omitted). Although the parties consume a significant amount of energy arguing over the propriety of sanctions, the record indicates no Federal Rule of Civil Procedure 11 sanctions were ordered. Rather, the magistrate judge's November 29, 1991 order imposing "sanctions . . . for the attorney fees required by defendants to respond to plaintiff's Motion for Reconsideration, in reality was nothing more than a mislabeled, though nonetheless justified, award of

attorney fees under Local Rule 602 C. That rule expressly states: "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that attorney fees will be awarded to the prevailing party on such review" (emphasis added).[11] Thus, Local Rule 602 C clearly authorized the magistrate judge's "sanctions."[12]

There is, however, a legitimate sanctions issue before this court. Defendant RTD asks this court to "award RTD costs and attorney fees pursuant to

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[11] Though plaintiff asks this court to strike the attorney fee provision of Local Rule 602 C, he offers no persuasive reason why this court should do so.

[12] The magistrate judge's reference to the award as "sanctions" and later inaccurate references by the parties and district court to the award as "attorney fees and costs" may have contributed to the parties' confusion over this relatively uncomplicated matter.

42 U.S.C. § 1988, Fed. R. Civ. P. 11, Fed. R. Civ. P. 56(g), as well as such other and further relief this Court deems fair and equitable." The named defendants also ask for attorney fees and costs relating to the appeal.

Under Fed. R. App. P. 38, "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous "if the result is obvious or if the appellant's arguments wholly lack merit." Willner, 848 F.2d at 1036. In the instant case, there are a number of grounds on which to conclude plaintiff's arguments on appeal are frivolous and to impose sanctions.

It is difficult to believe that the many legal misrepresentations and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional. A typical example is

counsel's argument that 28 U.S.C. § 636(b)(1)(A) requires a district court to reconsider a magistrate judge's order despite the statute's plain statement that a district judge "may reconsider" such an order (emphasis added).

In addition, defendants present compelling arguments for sanctions. For instance, defendant ATU notes that "to this day" it "has no idea what it is alleged to have done." Similarly, the named defendants claim they were never given proper notice of the specific actions they allegedly took to deprive plaintiff of his constitutional rights.[13] In their joint answer, defendants maintain that if an appeal of sanctions "is itself frivolous, Rule 38 gives

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[13] Having reviewed the pleadings, we too are puzzled over who some of the named defendants are or what role they may have played in terminating plaintiff.

appellate courts ample authority to award expenses." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 407 (1990) (a case involving Rule 11 sanctions).

Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by plaintiff's attorney and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of

legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

The judgment of the district court is AFFIRMED, and the case is remanded for a determination of reasonable attorney fees for each defendant for defending this appeal. Those fees shall be assessed against counsel for plaintiff, but not plaintiff. Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

Entered for the Court

John P. Moore
Circuit Judge

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1771

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
AMALGAMATED TRANSIT UNION, LOCAL 1001,
MICHAEL GARCIA, RICHARD BAUMAN, ROBERT
GARSIDE, ED RHATICAN, PETE PEREA, BERNIE
SNYDER, GEORGE STANKO, GREGG FISHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May, 1994

23 pp

QUESTION PRESENTED

1. Whether Plaintiff's Petition for Issuance of a Writ of Certiorari to review the Tenth Circuit's January 15, 1993, Order and Judgment is timely.

2. Whether the Tenth Circuit abused its discretion in failing to disqualify itself as requested by Plaintiff's counsel.

3. Whether the Tenth Circuit Court of Appeals abused its discretion in affirming the amount of monetary sanctions assessed against Plaintiff's Attorney by the Federal District Court for the District of Colorado.

LIST OF PARTIES

The Parties to the Proceedings below were the Petitioners John Casillan and his attorney David L. Smith, and Respondents Regional Transportation District, Michael Garcia, Ed Rhatican, Pete Perea, Bernie Snyder, George Stanko, Gregg Fisher and the Amalgamated Transit Union, Local 1001.[1]

The Regional Transportation District ("RTD") is a statutory political subdivision of the State of Colorado pursuant to Colo. Rev. Stat. § 32-9-119(1)(a) (1973). The Amalgamated Transit Union, Local 1001, ("ATU") is the recognized exclusive bargaining agent for represented employees at RTD.[2]

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[1] Petitioners captioned their appeal to the Tenth Circuit "DAVID L. SMITH, Appellant, v. SALLY ZACK WHEELER, PATRICIA A. COAN and LYNNE L. HICKS, Appellees. These named "appellees" are the attorneys of record for the respondents. The Tenth Circuit never recognized these individuals as proper parties.

[2] Instead of filing a responsive brief in the Tenth Circuit Court of Appeals, Defendant/Appellee Amalgamated Transit Union, Local 1001, moved to adopt the answer brief filed by the other defendants. That Motion was granted by the Tenth Circuit in its December 14, 1993, Order and Judgment. Appendix to petition for certiorari at 5a (hereinafter "App.")

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	3
Conclusion	17

TABLE OF AUTHORITIES

Cases Cited:

	PAGE
Applewood Landscape & Nursery v. Hollingsworth, 884 F.2d 1502 (1st Cir. 1989)	16
Braley v. Campbell, 832 F.2d 1504 (10th Cir. (1987)	4
Breed v. Jones, 421 U.S. 519 (1975)	15
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	10
Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992)	4
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)	4
Des Vignes v. Dept. of Transportation, 791 F.2d 142 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 853 (1986)	16
Dunkin v. Louisiana, No. 92-N-293 (D.Colo. December 10, 1992)	9
Fox v. Mazda Corp. of America, 868 F.2d 1190 (10th Cir. 1989)	4
GJB and Associates, Inc. v. Singleton, 913 F.2d 1504 (10th Cir. 1990)	5
Green Construction Co. v. Kansas Power and Light Co., 137 F.R.D. 22 (D.Kan. 1991)	5
Hilgeford v. Peoples Bank, 776 F.2d 176 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986)	16
Hinman v. Rogers, 831 F.2d 937 (10th Cir. 1987)	10
In re Land v. First National Bank of Alamosa, 943 F.2d 1265 (10th Cir. 1991)	5
In re McIntosh, 137 B.R. 967 (D.Colo. 1992)	10

PAGE

McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990) 12

Missouri v. Jenkins, 495 U.S. 33 (1990) 3

Qualls v. Regional Transportation District, No. 91-Z-989 (D. Colo., July 8, 1993) (order) 15

Singer v. Wadman, 745 F.2d 606 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) 11

Smith v. Freeman, 921 F.2d 1504 (10th Cir. 1987) 4

Spitzweiser-Wittgenstein v. Newton, 978 F.2d 1195 (10th Cir. 1992) 5

White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) 13

White II, 977 F.2d 499 (10th Cir. 1992) 14

Willner v. University of Kan., 848 F.2d 1023 (10th Cir. 1988), *cert denied*, 488 U.S. 1031 (1989) 10

Statutes Cited:

28 U.S.C. § 1254 3

28 U.S.C. § 2101(c) 3

28 U.S.C. § 455(a) 9

28 U.S.C. § 144 10

28 U.S.C. § 1912 16

Other Authorities Cited:

D.C. Colo. LR 602 C (1991) 2

U.S. Const. amend. V 15

Sup. Ct. R. 42.2 6

Fed. R. App. P. 38 6

No. 93-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
AMALGAMATED TRANSIT UNION, LOCAL 1001,
MICHAEL GARCIA, RICHARD BAUMAN, ROBERT
GARSIDE, ED RHATICAN, PETE PEREA, BERNIE
SNYDER, GEORGE STANKO, GREGG FISHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is not reported, and is reproduced at page 1a of the Appendix.

STATEMENT OF THE CASE

Plaintiff Casillan ("Casillan") filed his complaint September 27, 1990. First and second amended complaints were filed January 10, 1991 and August 13, 1991 respectively. On December 10, 1991, the district court dismissed all of Plaintiff's claims for failure to state any claim for relief.

During the proceedings Defendant RTD filed a request for Protective Order in response to a request by Plaintiff for personnel files. Notwithstanding the Court's ruling in Plaintiff's favor[3], Plaintiff's counsel filed a Motion for Reconsideration.[4] In addition to denying Plaintiff's Motion for Reconsideration, the magistrate judge awarded attorney fees under then existing Local Rule 602 C[5] of the United States District Court for the District of Colorado.[6]

On January 15, 1993, a panel of the Tenth Circuit affirmed the district court's dismissal of Plaintiff's complaint and award of attorney fees in *Casillan v. RTD, et al.,* (cases numbered 92-1009 and 92-1039, *supra,* rehearing denied). The Tenth Circuit found Casillan's action "groundless from the day of filing" and remanded to the district court solely for a determination of reasonable attorney fees to be assessed against Plaintiff's attorney for pursuing frivolous appeals. Plaintiff's request for rehearing was denied by the Tenth Circuit on February 17, 1993. No petition for writ of certiorari questioning the Tenth Circuit's January 15, 1993 Order and Judgment was filed within the required time limits. As a result, said Order and Judgment have become final and this Court lacks jurisdiction to review the merits of the January 15, 1993, Order and Judgment.

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[3] The magistrate ruled in favor of Plaintiff finding that Defendant failed to attach part of the supporting documentation required by local court rule.

[4] Specifically, Plaintiff's counsel argued that the magistrate's order was clearly erroneous and contrary to law because it "deprived Plaintiff's counsel of the opportunity to expunge the record of false and defamatory statements" allegedly made by defendant RTD and its counsel.

[5] Rule 602 C expressly states: "parties seeking or responding to a reconsideration of a magistrate's order should expect that attorney fees will be awarded to the prevailing party on such review."

[6] In the order awarding attorney fees, the magistrate judge noted that fees were justified on two grounds: "Not only did the court rule in Plaintiff's favor because it agreed with Plaintiff that defendant failed to attach supporting documentation, but Plaintiff has failed to cite any authority in support of his assertion that the court abused its discretion." (App. 32a-33a)

Following notice, an opportunity to respond, and a two hour hearing on April 9, 1993, the District Court for the District of Colorado, ordered Plaintiff's counsel to pay attorneys' fees totaling $14,481.50 to Defendants' counsel. On December 14, 1993, a panel of the Tenth Circuit affirmed the district court's award of fees. That determination is the subject of this petition for certiorari.

REASONS FOR DENYING THE WRIT

1. PETITIONER'S REQUEST FOR REVIEW OF THE TENTH CIRCUIT'S JANUARY 15, 1993, ORDER AND JUDGMENT IS UNTIMELY.

Petitioner argues jurisdiction under 28 U.S.C. § 1254 for this Court to review the Order and Judgments issued by the Tenth Circuit both on January 15, 1993, and on December 14, 1993.[7](Petition at 2-3). Petitioner's "Conclusion" requests this Court exercise its "power of supervision" over the Tenth Circuit and the district court. (Petition at 29-30). In between, Petitioner recites a litany of unsubstantiated grievances.

Petitions for writ of certiorari in a civil action must be "taken or applied for within ninety days after the entry of such judgment or decree." 28 U.S.C.§ 2101(c). While the filing of a petition for rehearing may toll the applicable period, the 90-day limit is mandatory and jurisdictional. *Missouri v. Jenkins,* 495 U.S. 33 (1990). Accordingly, any issue regarding the Tenth Circuit's January 15, 1993 decision, including its decision to impose

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[7] The December 14, 1993 Order only affirms the amount of sanctions and/or attorney fees assessed by the district court pursuant to the Tenth Circuit's January 15, 1993 determination.

In a petition for certiorari filed with this court on March 31, 1994, Mr. Smith's attorney described briefly the proceedings in *Casillan* and represented that "On March 14, 1994, Smith submitted a petition for writ of certiorari to this Court by which he seeks review of the *sanctions orders.*" (emphasis added). *In re: David L. Smith,* No. 931547 at 12.

Although Respondents have not been served with a copy of the petition in *In re: David L. Smith* at 17 n.8 to the present petition requests these Respondents oppose such request.

sanctions, is now moot as it is the law of the case. *See Fox v. Mazda Corp. of America,* 868 F.2d 1190, 1194 (10th Cir. 1989).

The standard of review for sanctions or an award of attorney fees is whether the court abused its discretion. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990); *Coffey v. Healthtrust, Inc.,* 955 F.2d 1388, 1393 (10th Cir. 1992); *Smith v. Freeman,* 921 F.2d 1120, 1122 (10th Cir. 1990). Sanctions in the form of fees may be awarded against an attorney for conduct that is either intentional or in reckless disregard of the attorney's duties to the court. *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987).

On January 15, 1993, the Tenth Circuit found Casillan's case "groundless from the day it was filed." The remand to the district court was limited to the determination of the appropriate amount of fees to be awarded.[8] The district court did not have discretion to determine the propriety of the sanctions award

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[8] The Tenth Circuit ruled:

> Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by plaintiff's attorney and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.
>
> The judgment of the district court is **AFFIRMED**, and the case is remanded for a determination of reasonable attorney fees for each defendant for defending this appeal. Those fees shall be assessed against counsel for plaintiff, but not plaintiff.

(App. 38a-39a).

itself; the Tenth Circuit had already made that determination.[9] As a result, the only issue that may be properly before this Court in a Petition for Writ of Certiorari is the Tenth Circuit's December 14, 1993 determination that the amount of attorney fees awarded by the district court was proper.

2. CASILLAN'S COUNSEL WAS GIVEN AMPLE NOTICE AND SEVERAL OPPORTUNITIES TO RESPOND TO THE FEE REQUESTS.

Plaintiff's counsel contends he never received notice that sanctions might be imposed by the Tenth Circuit on appeal. (Petition at 10). This is incorrect.

Due process requirements are met if the person against whom sanctions are sought has an opportunity to file a responsive brief. *GJB and Associates, Inc. v. Singleton,* 913 F.2d 824, 830 (10th Cir. 1990); *Green Construction Co. v. Kansas Power and Light Co.,* 137 F.R.D. 22, 23 (D. Kan. 1991). Due process is, of course, also duly met if the party against whom sanctions are sought fails to reply to notice that sanctions are requested. *Spitzweiser-Wittgenstein v. Newton,* 978 F.2d 1195, 1204 (10th Cir. 1992) (a criminal case); *In re Land v. First National Bank of Alamosa,* 943 F.2d 1265, 1268 (10th Cir. 1991).

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[9] The Tenth Circuit described the proceedings:

> This proceeding arises out of an unsuccessful civil rights action litigated by *appellant David L. Smith* as counsel for plaintiff John Casillan. On two prior appeals, this court affirmed the district court's dismissal of the action and its imposition of sanctions. An en banc petition for rehearing and motion to disqualify the author of the adverse order and judgment were also denied. As a sanction for pursuing the frivolous appeals, this court held plaintiff's counsel accountable for attorneys' fees incurred by the opposing parties, and *remanded the matter to the district court for a determination of the appropriate amount. On remand, the district court awarded $4,525.00, $3,269.00 and $6,687.50 to the attorneys representing three sets of defendants-appellees. This appeal followed.* (emphasis added)

(App. 2a-3a).

In its January 15, 1993 Order and Judgment the Tenth Circuit recognized that a request for sanctions had been made by Respondents:

> There is, however, a legitimate sanctions issue before this court. Defendant RTD asks this court to "award RTD costs and attorney fees pursuant to 42 U.S.C. § 1988, Fed. R. Civ. P. 11, Fed. R. Civ. P. 56(g), as well as such other and further relief this Court deems fair and equitable". The named defendants also ask for attorney fees and costs relating to the appeal." (App. 35a-36a).
>
> In their joint answer, defendants maintain that if an appeal of sanctions "is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses." (App. 37a-38a).

Plaintiff's counsel failed to object, or indeed even to respond, to Defendants' requests for costs and attorney fees on appeal.[10]

Plaintiff's counsel further contends that the district court failed to give him notice and an opportunity to be heard when it awarded $14,481.50 in attorney fees against him. (Petition at 18-19). These arguments too are without legal or factual basis.

Upon remand, Plaintiff's counsel received notice of a hearing to be held before Judge Sparr on April 9, 1993. Plaintiff's counsel was served with affidavits setting forth the fees requested

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[10] Specifically, the named defendant managers and supervisors requested attorney fees and costs in defending against the appeal in their responsive brief (Case No. 92-1009); RTD requested attorney fees and costs in its responsive brief (Case No. 92-1009); and, in their April 8, 1992 joint answer brief (Case. No. 92-1039), both the individual defendants and RTD requested attorneys' fees and costs under Fed. R. App. P. 38. Plaintiff did not file any reply briefs.

by Respondents.[11] A two hour hearing on attorney fees was held April 9, 1993, before Judge Sparr.[12] Plaintiff's counsel repeated the same conclusory allegations he makes in this petition to counter the request for attorney fees. Mr. Smith presented no evidence whatsoever, nor did he provide in his discourse with the district court any specific facts or other information to dispute the fees sought.[13] Counsel was not denied due process. He was given numerous opportunities to respond to respondents' claims for sanctions and fees and, with the exception of baseless conclusory arguments, simply failed to do so.

3. THE TENTH CIRCUIT HAS PREVIOUSLY DETERMINED THAT CASILLAN'S COUNSEL'S PLEADINGS WERE DEVOID OF MERIT.

Mr. Smith claims that no fees should have been assessed against him because he presented colorable claims in his pleadings. (Petition at 23). As previously argued, this issue is moot because the Tenth Circuit's January 15, 1993, order has become final.

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[11] The district court ordered Respondents to file affidavits detailing the attorney fees expended on appeal. Each of the Respondents served these pleadings on Mr. Smith in advance of the April 9, 1993, hearing. Mr. Smith filed a response and in turn requested attorney fees to be assessed against Respondents. (Petition at 10 n. 5).

[12] Plaintiff's counsel's appendix does not contain a transcript of the April 9, 1993 hearing before Judge Sparr. That hearing lasted over two hours and was designated by RTD as part of the additional record on appeal to the Tenth Circuit. Plaintiff's counsel never responded to RTD's designation. RTD requested an order requiring Plaintiff to include this transcript as part of the record. The Tenth Circuit in their December 14, 1993 Order and Judgment denied RTD's motion "as moot in light of our disposition of this matter." (App. 5a).

[13] With his client sitting silently beside him at counsel table, Mr. Smith did argue that his client might well be the proper party to pay any fees assessed. Nevertheless, Mr. Smith provided no evidence whatsoever of the relative fault between him and his client, nor did he present any evidence of the chilling effect any assessment might have upon civil rights practice in the Tenth Circuit.

The Tenth Circuit has determined previously and finally that there was no merit whatsoever to Plaintiff's complaint, just as there was no merit to his prior frivolous appeals or to the within frivolous petition for writ of certiorari. In responding to Plaintiff's counsel's arguments, the Tenth Circuit said, *inter alia*, "Mr. Casillan's complaint is devoid of *any facts* from which this court could surmise that a constitutionally protected liberty or property right was violated" (App. 18a-19a); "Plaintiff's complaint, moreover, is full of unsubstantiated, generalized, factual allegations which do not give Defendants *any* notice of the grounds upon which Plaintiff's claims are based" (emphasis added) and "[A]ll the claims in the complaint are disposable due to their legal inadequacy." (App. 19-21a); and,

> Plaintiff's Title VII claim also fails because Plaintiff alleges no facts to support a causal connection between his EEOC claims and his termination or retaliatory motives on the part of the named Defendants. Finally, Plaintiff's privacy, property, and liberty claims under the First, Fourth, Fifth, Ninth and Fourteenth Amendments are not actionable because the complaint fails to state specific constitutional rights which were violated or factual support for those claims. (App. 22a-23a).

Counsel's speculation and his wishful thinking are not a substitute for his duty as an officer of the court.[14] This petition is but another example of Plaintiff's counsel's exhibition of extreme disregard for the rulings of the Federal Courts.[15]

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[14] In determining that sanctions were appropriate in this case, the Tenth Circuit stated: "It is difficult to believe that the many legal misrepresentations and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional."
(App. 36a).

[15] Petitioner was ordered to pay the sanctions *or to contact respondents* to make arrangements to pay sanctions within thirty days of the District Court's Order. An Order to Show Cause was issued only after *Petitioner admitted* he had not paid the amounts assessed and *had not made any effort whatsoever to contact respondents* as ordered. Shortly before the contempt hearing, Petitioner filed another Motion to Disqualify the District Court. That Motion remains pending.

4. UNSUBSTANTIATED CLAIMS THAT A JUDGE IS BIASED ARE INSUFFICIENT CRITERIA FOR RECUSAL UNDER 28 U.S.C. § 455(a).

Plaintiff's counsel has filed numerous motions to disqualify judges in this district and the Tenth Circuit not only in the course of this proceeding but also in the course of other recent litigation[16]. These motions have generally accused the courts of bias and lack of impartiality and have generally been filed, as in this case, after sanctions have been ordered or an opinion has been rendered adverse to Plaintiff's counsel or his client.

In the present case, Plaintiff, although moving to disqualify the attorney for the ATU and suggesting that RTD's attorney should disqualify herself, made no attempt to disqualify *any* judge, whether district or appellate until *after* obtaining an adverse opinion from the Tenth Circuit Court of Appeals on January 15, 1993. Then, for the first time, Plaintiff filed a motion demanding that the author of that opinion, Circuit Judge John P. Moore, recuse himself under 28 U.S.C. § 455(a). For the first time Plaintiff questioned Judge Moore's impartiality because Judge Moore authored orders and judgments affirming rulings of the district court and criticized the conduct of Plaintiff's counsel. Similarly, no motion to recuse Judge Sparr was made until *after* remand by the Tenth Circuit with direction to assess attorney fees incurred by Defendants in defending Plaintiff's appeal personally against David Smith.

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[16] In *Duncan v. Louisiana Pacific*, No. 92-N-293 (D. Colo.), Judge Nottingham, on December 10, 1992, ordered Plaintiff's counsel to pay Defendant $1,807.93 in attorneys' fees and costs by 12/16/92. On December 16, 1992, Plaintiff filed a motion to recuse Judge Nottingham.

In the same case, on July 17, 1992, David Smith was ordered to pay $4,060.00 personally to defendant's counsel plus the costs of a transcript.

Smith appealed both orders and was sanctioned by the Tenth Circuit on February 11, 1993, which said "Sanctions are appropriate in this case. Counsel for the Plaintiff not only pursued appeal No. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect." (*Id.*, Case Nos. 92-1230 and 92-1381).

Judge Moore refused to recuse himself:

> A judge must recuse under 28 U.S.C. 455(a) when a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality. *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992) (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)). Ruling adverse to a party is not an act of bias requiring recusal. *Glass v. Pfeffer*, 849 F. 2d 1261, 1268 (10th Cir. 1988).

By order filed February 17, 1993, Plaintiff's petition for review of Judge Moore's decision was denied. Plaintiff's request that the entire three judge appellate panel disqualify themselves was also denied.

Although the affidavits required under 28 U.S.C. § 144 are not required under § 455(a), a request for recusal must still be accompanied by a recitation of *facts* which would support a finding of bias or lack of impartiality. As in this petition, petitioner relies not on facts, but rather on the argument that the pertinent members of the Tenth Circuit are biased against Plaintiff, his attorney and his civil rights case because the Court ruled adversely to their interests.

Here there was no reason for either the district court or the Tenth Circuit to recuse. "The test is whether a reasonable person, *knowing all the relevant facts*, would harbor doubts about the judge's impartiality" not whether an attorney dislikes an adverse ruling. *In re McIntosh*, 137 B.R. at 967, 970 (D. Colo. 1992), (emphasis added). "[I]n deciding whether to recuse, 'there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.' " *In re McIntosh*, 137 B.R. at 970, (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)).

A court "should not recuse [itself] on [the] unsupported, irrational or highly tenuous speculation" of Plaintiff and his counsel. *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). *See also, Willner v. University of Kan.*, 848 F.2d 1023, 1027 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989) (recognizing that an

unsubstantiated suggestion of personal bias or prejudice is insufficient to mandate recusal under § 455(a) and stating "that a judge ha[s] a duty *not* to recuse himself on unsupported speculation.").

Plaintiff presented no facts whatsoever which would warrant recusal under 28 U.S.C. § 455(a). His only complaints were of adverse rulings. Under these circumstances, the court was obligated not to recuse.

6. THE DISTRICT COURT'S CORRECT RULINGS AGAINST PLAINTIFF AND HIS COUNSEL ARE NOT VALID REASONS FOR RECUSAL UNDER 28 U.S.C. § 455(a).

Plaintiff's counsel appears to argue that consistent adverse rulings provide a basis for recusal in this case. This argument too is without merit.

> As a general rule, recusal under 455(a) must be predicated on extra-judicial conduct. . . . *Consistent adverse rulings, without more, is not a reason for recusal, even if the court made legal errors*. . . . Likewise, friction between the court and counsel or antipathy to an attorney are also insufficient grounds for recusal. . . . However, there is an exception to the requirement of extra-judicial bias when "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."

In re McIntosh, 137 B.R. at 970 (emphasis added) (citations omitted). *See also, Hinman*, 831 F.2d at 939 ("A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation"); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) (affirming the district court's refusal to recuse under 28 U.S.C. § 455(a), in part, because "the various remarks made by the district judge during the course of the proceedings do not, as counsel suggests, substantiate the claim of bias or prejudice [and] [o]n the contrary, . . . the district judge exhibited commendable patience and restraint throughout this admittedly and understandably

emotional affair."); and *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) ("Ordinarily, a judge's rulings in the same or related case may not serve as the basis for a recusal motion.").

Taking Plaintiff's counsel's unsupported allegations as true solely for purposes of argument, they are, nevertheless, insufficient as a matter of law to support recusal. "Consistent adverse rulings, without more, is not a reason for recusal." *In re McIntosh*, 137 B.R. at 970.

7. DEFENDANTS' COUNSEL HAVE MET THE *CHRISTIANSBURG* AND *WHITE* STANDARDS FOR AN AWARD OF FEES.

Plaintiff's counsel argues that the fee award was an abuse of discretion because it was in an amount greatly in excess of the minimum that would adequately serve to deter any undesirable behavior (Petition at 25); that it would chill civil rights litigation (Petition at 27); because there was no specific finding regarding relative fault between him and his client (Petition at 28); and the "monetary sanctions against Mr. Casillan's attorney [were] in an amount that he is financially unable to pay." (Petition at 29). In addition, for the first time, and without citation of authority, Petitioner argues: "The Tenth Circuit subjected Mr. Casillan's attorney to double punishment for the same conduct by suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him . . . are paid." (Petition at 29).

a. Plaintiff's complaint and appeals were not only objectively unreasonable, but as they were fact-less and without any legal foundation, met the higher *Christiansburg* frivolous standard.

Plaintiff's counsel claims any award of fees would chill the filing of civil rights suits. In *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978), the Court said that to award fees to a prevailing Defendant, "[t]he district court must find that the Plaintiff's action was frivolous, unreasonable or without foundation even though not brought in subjective bad faith."

The Tenth Circuit commented on the "many legal misrepresentations and unsubstantiated, conclusory allegations" in Plaintiff's pleadings and found they were not "unintentional." (App. 36a). The Court recognized that Plaintiff had dragged respondents "pointlessly through the courts for the past two years" and that "the cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal proceedings." (App. 38a-39a).

The standard is one of objective reasonableness. *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). There can be no question from a review of its January 15, 1993 Order and Judgment that the Tenth Circuit has determined Plaintiff's counsel's conduct to be objectively unreasonable, frivolous, and "groundless from the day of filing." (App. 38a).

b. The Tenth Circuit has already ruled that fees were to be assessed against counsel for Plaintiff but not Plaintiff.

Counsel argues an abuse of discretion because no relative fault was assessed. As discussed *supra* n.13, Plaintiff's counsel presented no evidence whatsoever in support of his claim.

The responsibility for conducting proper legal investigation and research and drafting legal pleadings is for the Plaintiff's lawyer. Here, the complaint was dismissed for failure to state a cause of action, the court ruling that "all the claims contained in the complaint are disposable due to their legal inadequacy." (App. 21a). Further the Tenth Circuit stated, "It is difficult to believe that the many *legal misrepresentations* and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional." (Petition at 36a) (emphasis added). *See also* discussion quoted at n. 8.

Interestingly enough, Mr. Smith, despite claiming that his client might well bear the blame for the many "legal misrepresentations" discussed by the Tenth Circuit, continues to represent Mr. Casillan. If this were indeed a viable issue, it is obvious that a conflict of interest exists between attorney and client such

that Mr. Smith should have withdrawn from any further representation. Nonetheless, Mr. Smith continues to represent Plaintiff lending further support to the argument that any responsibility for the legal misrepresentations belongs solely to Plaintiff's counsel.

d. Plaintiff's counsel should be sanctioned to the fullest extent of this Court's powers because of his history of noncompliance with prior sanction orders.

Cooter & Gell v. Hartmarx Corp, 496 U.S. 384 (1990), as adopted by the Tenth Circuit in *White, supra* held the purpose of sanctions is deterrence and the amount levied must be upon the person responsible for the violation.

Casillan's counsel contends the fee award was excessive and not the minimum required to deter his conduct. (Petition at 25). This argument is without merit under *White.*

In *White II,* 977 F.2d 499, 502 (10th Cir. 1992), the 10th Circuit said that "the growing list of cases involving sanctions against this attorney is relevant history and may be considered to determine the appropriate sanctions to impose here."

Here, despite previous sanctions by the 10th Circuit and by several judges in the district court, Mr. Smith's conduct has been and continues to be objectively unreasonable and vexatious. As Chief Magistrate Judge Abram noted in the text of a recent sanction against Mr. Smith:

> Plaintiff's counsel is no stranger to sanctions. This Court has sanctioned him. The Tenth Circuit has sanctioned him (*Casillan, supra*), Judge Weinshienk has sanctioned him, Judge Babcock has sanctioned him, (*DeHerrera v. City and County of Denver,* No. 90-B-260 (D. Colo. Feb. 4, 1993)), Magistrate Judge Schauer has sanctioned him (*Casillan v. Regional Transp. Dist.,* No. 90-S-1722 (D. Colo. Aug. 30, 1991)), and Judge Sparr has sanctioned him (*Id.*) Obviously, as this Court has noted, sanctioning Plaintiff's counsel has little effect on his litigation tactics and behavior. Rep. Trans. at 25 (May 26, 1993). Notwithstanding past failed attempts at deterrence, this

> Court believes that only by forcing Plaintiff's attorney to *pay* fees and costs will he change his ways.

Qualls v. Regional Transportation District, No. 91-Z-989 (D. Colo., July 8, 1993 (order) filed in the Tenth Circuit.

Despite severe warnings, Plaintiff's counsel persists in attempts to vex and aggravate the undersigned counsel as again exemplified by his naming counsel as Defendants in one appeal. *Supra* n.1. This unnecessary and improper tactic is but another example of Plaintiff's counsel's antipathy toward procedural rules and the requirements of proper pleading.

Without citation of applicable legal authority or facts, Plaintiff's counsel repeatedly argues that court rulings are simply wrong. His disdain for the federal courts in this jurisdiction is well documented by his sanctions history. He acknowledges that over $50,000 in sanctions have been imposed against him. (Petition at 16 n.8). Obviously $14,481.50 is not enough to deter his conduct as evidenced by this frivolous petition for certiorari.

e. Plaintiff's argument that he is being subjected to double punishment is without merit.

Without citation of authority Plaintiff alleges he is being subjected to double punishment by virtue of the sanctions imposed in this case and the disciplinary suspension from practice in the Tenth Circuit until such time as all sanctions are paid. (Petition at 29).

It is difficult, if not impossible, to discern from the petition the legal theory upon which Plaintiff's counsel depends. Any reliance, however, on the Fifth Amendment provision that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" is inapplicable since the Constitution's double jeopardy clause is applicable only to criminal proceedings. *See, e.g., Breed v. Jones,* 421 U.S. 519 (1975).

8. RESPONDENTS SHOULD BE AWARDED ATTORNEYS' FEES AND COSTS PURSUANT TO SUP. CT. R. 42.2. FOR THE FILING OF A FRIVOLOUS PETITION FOR WRIT OF CERTIORARI.

Rule 42.2 of the Rules of the Supreme Court of the United States reads in pertinent part as follows: "When a petition for a

writ of certiorari . . . is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both."

An appeal is frivolous if no authority is cited in support, *Hilgeford v. Peoples Bank,* 776 F.2d 176 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986); if bald assertions are made without factual or legal support, *Des Vignes v. Dept. of Transportation,* 791 F.2d 142 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 853 (1986); or, if an appeal is directed at decisions made which were within the court's discretion, *Applewood Landscape & Nursery v. Hollingsworth,* 884 F.2d 1502 (1st Cir. 1989). *See also* cases cited in *Braley,* 832 F.2d at 1513.

Rule 42.2 is the counterpart of Rule 38 of the Federal Rules of Appellate Procedure and complements the provisions of 28 U.S.C. § 1912 which provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

The assessment of costs occurred after the hearing of April 9, 1993. Plaintiff's counsel was ordered to make payment or contact respondents to make arrangements. After his admission that he made no contact whatsoever with respondents, an order to show cause was issued. In order to avoid the scheduled hearing, counsel requested the district court disqualify itself under § 455(a).

While the sanctions imposed in those other cases referred to by the Tenth Circuit in *In Re: Smith* were the result of interlocutory appeals, the judgment in Casillan was final prior to the award of appellate sanctions; and therefore, counsel's legal justification for non-payment argued in *In Re: Smith* is completely inapplicable. In addition, the award of sanctions affirmed by the Tenth Circuit on January 15, 1993, as a result of the improper use of Motions for Reconsideration remains unpaid.

The appendix attached to the Petition contains no more than the decisions rendered by the Tenth Circuit on January 15, 1993 and December 14, 1993. There is absolutely no factual

support in the Petition for any of the statements contained in Counsel's argument. Instead, rather than a legal analysis which would demonstrate why this Court should issue a writ of certiorari, the Petition contains a litany of disjointed complaints against the lower court as well as misstatements of law and fact. Quite simply, this filing is no more than an attempt to evade the consequences of counsel's own actions, delay payment of sanctions properly awarded, contest related disciplinary proceedings, relitigate final judgments, and, as the Tenth Circuit succinctly pointed out, "batter blameless parties."

Consequently, sanctions under Rule 42.2, including the award of double costs, are appropriate.

CONCLUSION

Respondents have been the object of Mr. Smith's baseless pleadings since September 1990, when he filed the first fact-less complaint. They were subjected to numerous unfounded pleadings, including tedious discovery disputes and numerous motions for reconsideration, followed by two appeals which lacked any foundation. Thus, the Tenth Circuit's sanctions against Mr. Smith and the trial court's assessment of reasonable fees were proper and appropriate.

Petitioner's petition for review of the sanctions award is without any supportable basis, justifying the award of further sanctions.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

(3)

No. 93-1771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

vs.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, DIVISION 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETER PEREA, BERNIE SNYDER, GEORGE STANKO, and GREGG FISHER,

Respondents.

(PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT)

BRIEF OF RESPONDENT AMALGAMATED TRANSIT UNION, DIVISION 1001 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petition should be dismissed because filed by an attorney suspended from practice before the Tenth Circuit.

2. If not, whether Petitioners' "factless" Complaint was properly dismissed for failure to state a claim;

3. Whether sanctions were imposed upon Petitioners in conformity with applicable law; and

4. Whether the failure of the District and Circuit Courts to recuse themselves because of Petitioners' dissatisfaction with their rulings was a violation of 28 U.S.C. § 455(a).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. BECAUSE ATTORNEY DAVID SMITH HAS BEEN SUSPENDED BY THE TENTH CIRCUIT, HE SHOULD ALSO BE SUMMARILY SUSPENDED FROM PRACTICE BEFORE THIS COURT, AND THE PETITION SHOULD BE STRICKEN 4

II. PETITIONERS HAVE MISCHARACTERIZED THE FACTS 5

III. NONE OF PETITIONERS' CONCLUSORILY STATED GROUNDS FOR CERTIORARI MEET THE STANDARDS OF S.CT.R. 10.1. IN EACH CASE, THE RULINGS COMPLAINED OF WERE WELL-GROUNDED IN THE LAW AND CONSISTENT WITH THE USUAL COURSE OF JUDICIAL PROCEEDINGS 6

A. Petitioners Were Not Entitled to Discovery before a Ruling on a Motion to Dismiss. The Cases Cited Are Inapposite 8

B. The Conspiracy Claim Was Addressed and Properly Dismissed 9

C. Far from Being Denied Due Process, Petitioners Failed to Exercise Their Rights to Respond to Requests for Sanctions 10

D. All of the Bases Asserted by Petitioners for Review of the Sanctions Imposed Against Attorney David Smith Are Consistent with Applicable Law 11

IV. NO SUPPORTABLE BASIS IS STATED FOR A VIOLATION OF 28 U.S.C. § 455(a). THE CLAIM IS BASED SOLELY UPON THE PETITIONERS' DISSATISFACTION WITH THE RULINGS IN THE CASE 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 8

Berger v. U.S., 255 U.S. 22, 31 (1921) . . 14

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 12

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) 10

Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) 9

Liteky v. U.S., No. 92-6921, ___ U.S. ____, 62 USLW 4161 (1994) 14

Swanson v. Bixler, 750 F.2d 810 (10th Cir. 1984) 9

U.S. v. Grinnell, 384 U.S. 563, 583 (1966) 14, 15

White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990) . . 11, 12, 13

Statutes

28 U.S.C. § 455(a) 14, 15

Other Authorities

Federal Rule of Civil Procedure 56 8

Supreme Court Rule 9.1 4

Supreme Court Rule 10.1 . . . . . 8, 9

Supreme Court Rule 15.1 5

Supreme Court Rule 14(k).5 7

Supreme Court Rule 8.1 4

Tenth Circuit Rule 31.2.1 11

STATEMENT OF THE CASE

Petitioners herein, plaintiff, John Casillan, and his attorney below, David Smith, request that this court exercise "supervision" of the U.S. District Court for the District of Colorado and of the Tenth Circuit Court of Appeals. Their request is based solely on their dissatisfaction with the rulings in the case below.

This case arose out of the termination of Mr. Casillan by his employer, the Regional Transportation District ("RTD"). Mr. Casillan was a member of a duly-recognized collective bargaining unit represented by this Respondent, the Amalgamated Transit Union, Division 1001 (the "Union").

Mr. Casillan grieved his termination, and in due course, the Union took his grievance to arbitration. The Union won Mr. Casillan's reinstatement. However, the arbitrator ruled that while Mr. Casillan's termination was improper, the evidence presented demonstrated that RTD had reason for legitimate concern. Accordingly, the arbitrator made Mr. Casillan's reinstatement conditional upon his submission to a psychological evaluation which, he believed, would assauge

the District's concerns and limit its potential liability.

Mr. Casillan did not take the examination and, instead, filed a complaint against his employer, certain managerial employees of his employer, and his union, which complaint led to this appeal. Of his many alleged causes of action, only those concerning asserting conspiracy among the Respondents are implicated in this appeal. The balance of the issues raised herein concern sanctions imposed upon the Petitioners.

This Respondent did not participate in any of the proceedings concerning sanctions imposed for filing a motion for reconsideration of Magistrate Schauer's rulings, and accordingly, does not comment on the whether imposition or affirmation of the sanctions constitutes grounds for certiorari.

The balance of the sanctions appealed from were ordered by the Tenth Circuit to be imposed solely upon Petitioner David Smith for his baseless appeal of the dismissal of a "fact-less" complaint based upon frivolous legal arguments. In the course of discussing the lack of legal merit adduced in the appeal to the Circuit, the court also addressed the numerous abuses of pro-

cess the defendants had endured in proceedings below.

SUMMARY OF THE ARGUMENT

In the Petition, attorney David Smith admits that he has been suspended from practice by the Tenth Circuit. Under S.Ct.R. 8.1, he is disqualified from filing a petition with this Court on behalf of a client, and this Petition should be dismissed on that basis.

Even if this Petition were considered for review, the Petitioners assert no basis for a grant of certiorari under S.Ct.R. 10.1. The Petition consists of nothing more than conclusory allegations and extensive, foot-noted case citations. The cases cited are all either inapposite or easily distinguishable from the case at bar.

To put it succinctly, Petitioners were not entitled to discovery before the District Court ruled on the Respondents' motions to dismiss, and Mr. Smith's appeal to the Tenth Circuit on this basis was frivolous. Accordingly, the Circuit's imposition of sanctions against attorney Smith was well within its discretion.

Mr. Smith asserts a plethora of procedural and equitable arguments for the proposition that there was something improper about the way the

sanctions were imposed. Not one of these arguments has any merit whatsoever. There was no departure, or sanction of a departure, from the accepted and usual course of judicial proceedings. Much less do any of the alleged irregularities rise to a level of import which warrants this Court's attention.

ARGUMENT

I. BECAUSE ATTORNEY DAVID SMITH HAS BEEN SUSPENDED BY THE TENTH CIRCUIT, HE SHOULD ALSO BE SUMMARILY SUSPENDED FROM PRACTICE BEFORE THIS COURT, AND THE PETITION SHOULD BE STRICKEN.

Supreme Court Rule 9.1 provides that an attorney seeking to file a pleading, motion or other paper with the Court must first be admitted to practice therein. However, Supreme Court Rule 8.1 states, in pertinent part:

> Whenever it is shown to the Court that a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this court, that member will be suspended from practice before this Court forthwith . . . .

(Emphasis supplied.)

Attorney Smith admits, and complains extensively about, the fact that he has been suspended from practice before the Tenth Circuit Court

of Appeals. (See four-page footnote, Petition, pp. 14-17.) The Rule is unambiguous. David Smith should be suspended forthwith and, having no right to file representational pleadings with this Court, the Petition should be dismissed.

II. PETITIONERS HAVE MISCHARACTERIZED THE FACTS.

Petitioners' characterization of the "facts" is disputed by the Respondent Union in several respects. It consists of no more than the mere opinion of Petitioners and is wholly unsupported by any findings of record. It has, for example, never been established whether the accusation that Mr. Casillan attempted to run down a co-employee with a golf cart was false. The statements that the Union failed or refused to adequately represent Mr. Casillan and that the arbitrator "issued a decision rubber-stamping the unconstitutional actions by the RTD and its officials" are scandalous, impertinent, and also unsupported by any findings of record.

These factual inaccuracies are cited in deference to S.Ct.R. 15.1 only because, taken with other inaccurate allegations, Petitioners would have it appear to the Court that Petitioner Casillan was subjected to a series of highly irregular proceedings. That is not true. The

more important misstatements, however, concern certain rulings made by the district and appellate courts, and are discussed below in the order in which they appeared in the Petition.

III. NONE OF PETITIONERS' CONCLUSORILY STATED GROUNDS FOR CERTIORARI MEET THE STANDARDS OF S.CT.R. 10.1. IN EACH CASE, THE RULINGS COMPLAINED OF WERE WELL-GROUNDED IN THE LAW AND CONSISTENT WITH THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

In their Statement of the Case, Petitioners complain that U.S. District Court Judge Daniel B. Sparr ruled on the motions to dismiss and/or for summary judgment filed by all the defendants below (Respondents herein) without permitting the Petitioners further discovery. They complain that the U.S. Court of Appeals for the Tenth Circuit failed to rule on the merits of their conspiracy theory. They also complain that the courts imposed monetary sanctions for filing a frivolous appeal upon the attorney, David Smith, without notice or an opportunity to be heard. They further complain that the Tenth Circuit upheld the District Court's findings, on remand, concerning the proper amount of attorney fees to be assessed, without addressing Petitioners' arguments in opposition to the Tenth Circuit's sanction and without heeding attorney

Smith's claims of impecuniosity. (In a footnote, they also complain that the District Court refused to sanction the Respondents for also filing claims for attorney fees for proceedings in the District Court, a matter clearly within the court's discretion.)

Interestingly, the Argument consists solely of the statement that Mr. Casillan was "illegally" deprived of an opportunity for discovery, followed by a recitation of the various sanctions imposed against the Petitioners during the proceedings below. Rather than argument, this section contains only conclusory allegations that the sanctions were imposed in contravention of the holdings in various cases, supported solely by extensive, footnoted quotes from those cited cases.

As in proceedings below, no facts are stated upon which a court might base a decision on the merits. There is no reference to the record and no explanation of how the cited cases should be applied to the facts in this case. Having not made clear the basis upon which certiorari should be granted, the Petition does not conform to the requirements of Supreme Court Rule 14(k).5.

Despite these inadequacies, the gist of the Petitioners' arguments may be garnered from the juxtaposition of conclusory allegations and case citations provided. However, these "arguments" consist of nothing more than mere disagreement with the well-grounded holdings of the Tenth Circuit that the case law upon which Petitioners relied is miscited or does not apply under the facts of this case.

The Petitioners' conclusory statements are addressed *in seriatim*. None of them state a basis under which certiorari might be granted under S.Ct.R. 10.1.

A. Petitioners Were Not Entitled to Discovery before a Ruling on a Motion to Dismiss. The Cases Cited Are Inapposite.

Regarding the claim that the District Court dismissed the complaint without benefit of complete discovery, the Petitioners fail to acknowledge that the Complaint was dismissed for failure to state a claim, and not as the result of a grant of summary judgment under F.R.C.P. 56. (See Appendix 29a.) Accordingly, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) is completely inapposite.

As noted by the Tenth Circuit, the complaint in this case remained "fact-less" (Appendix 29a) even after being twice amended (Appendix 24a.). The Court explained to Petitioners that its holding in Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979), was based on a complaint which contained "specific facts", "as distinguished from conclusory allegations", citing its holding in Swanson v. Bixler, 750 F.2d 810 (10th Cir. 1984). (Appendix 16a-18a, emphasis in the original.) In this case, Petitioners utterly failed to meet the minimum standards for a sufficient complaint which could survive a motion for dismissal, much less entitle plaintiff to discovery, as in Lessman.

Upholding the dismissal of the complaint under these circumstances was wholly supported by the law and was consistent with the usual and accepted course of judicial proceedings. It was not in conflict with the decisions rendered by this Court or by any other court cited by Petitioners or known to Respondent Union. It therefore presents no basis, under S.Ct.R. 10.1 or otherwise, upon which to grant certiorari.

B. The Conspiracy Claim Was Addressed and Properly Dismissed.

Petitioners' claims that the Tenth Circuit failed to address the merits of their conspiracy

claim, and the dismissal thereof over their objections, is contrary to fact. The Tenth Circuit clearly held that they failed to state a conspiracy claim (Appendix 21a), and dismissed the complaint on that basis, among others (Appendix 25a-29a). Petitioners' citations to Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) are unavailing. They have not stated in what respect the dismissal of the conspiracy claim was 'based on a clearly erroneous view of the law'.

As noted above, the dismissal of the complaint, including the conspiracy claims therein, where no facts were pleaded, was wholly supported by the law, was consistent with the usual and accepted course of judicial proceedings, and was not in conflict with the decisions of any court. Upholding the dismissal of the conspiracy claim therefore presents no separate basis upon which this Court might grant certiorari.

C. Far from Being Denied Due Process, Petitioners Failed to Exercise Their Rights to Respond to Requests for Sanctions.

In claiming they were denied due process when the Tenth Circuit imposed sanctions for their frivolous appeal, Petitioners fail to mention that Respondents' requests for attorney

fees were properly raised in their responsive briefs and that Petitioners failed to file a reply brief, as permitted under Tenth Circuit Rule 31.2.1 then in effect. Thus, contrary to the "argument" at pp. 18-19 of Petitioners' brief, in fact, Mr. Smith had notice of the request for attorney fees and failed to respond.

This is dispositive of any and all claims that Petitioners were denied due process in the award of attorney fees. They simply failed to utilize the process which was available. The proposition that the District Court had jurisdiction to review the propriety of the Tenth Circuit's imposition of sanctions is too ludicrous to warrant discussion. The rulings of both the Tenth Circuit and the District Court in this regard are wholly consistent with the normal course of judicial proceedings and form no basis for a grant of certiorari.

D. All of the Bases Asserted by Petitioners for Review of the Sanctions Imposed Against Attorney David Smith Are Consistent with Applicable Law.

Citation to White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990) does nothing to bolster Petitioners' claim that they presented colorable claims below. The only claims "argued" to this Court are those concerning the

right to discovery under an insufficient complaint and asserting that the conspiracy claim was not considered and was improperly dismissed. Those issues are discussed above. Petitioner has presented no argument and stated no facts to support a claim that their actions in this regard were objectively reasonable. By contrast, the Tenth Circuit was quite explicit in describing the conduct which it believed was unreasonable and warranted sanction. Accordingly, there is no basis for a grant of certiorari on the grounds that a decision was rendered contrary to the holding in White, *id.*

The conclusory, unsupported claim that Mr. Smith's conduct manifested no intentional or reckless disregard of his duty to the courts suffers a similar infirmity. There has been no showing that any holding in Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) has been disregarded, but the Tenth Circuit clearly stated its reasons for holding that Mr. Smith's transgressions were the result of more than mere inadvertence (Appendix 30a-37a).

Petitioners also complain that monetary sanctions were imposed upon counsel in excess of the minimum needed to deter future transgressions, in contravention of holdings in White,

supra, and in excess of Mr. Smith's ability to pay. However, Petitioners do not cite that portion of the White decision which notes that the sanctioned parties must "come forward with evidence of their financial status" in order for the court to consider whether the contemplated amount of the sanction is excessive. *Id.*, 908 F.2d at 685. Thus, if the sanction imposed was more than the necessary minimum, the burden was on Petitioner's counsel to demonstrate that fact to the District Court. Petitioners do not allege that counsel presented such evidence, and in fact, he did not. Accordingly, the imposition of sanctions was consistent with White and forms no basis for a grant of certiorari.

The complaint that the sanctions imposed would have a "chilling" effect on civil rights litigation is, as are all other claims, unsupported by any evidence, any finding, or any ruling. The "supporting" citation from White, while it mentions the "chilling" effect, wholly supports the Tenth Circuit's determination that the sanction of attorney fees was appropriate in this case based on its unequivocal findings concerning the severity of the violations and the bad faith with which they were committed. (Appendix 36a-39a.)

Furthermore, the award of sanctions leaves no doubt whatever, as between Mr. Casillan and his attorney, Mr. Smith, as to who is at fault. (Appendix 38a-39a.) The claim that it failed to do so is frivolous. The fault was apportioned to and the sanctions imposed upon Mr. Smith.

Mr. Smith's objections to his suspension by the Tenth Circuit is not properly before this Court in this appeal, as it did not arise out of the decision appealed from. Accordingly, they are not discussed here by Respondent Union except to note, as above, that Mr. Smith lacks standing to file a representational appeal in this case.

IV. NO SUPPORTABLE BASIS IS STATED FOR A VIOLATION OF 28 U.S.C. § 455(a). THE CLAIM IS BASED SOLELY UPON THE PETITIONERS' DISSATISFACTION WITH THE RULINGS IN THE CASE.

Finally, relying upon all of the contentions discussed and disposed of above. Petitioners claim a violation of 28 U.S.C. § 455(a). In Liteky v. U.S., No. 92-6921, ___ U.S. ____, 62 USLW 4161 (1994), this court was in complete agreement that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion", citing U.S. v. Grinnell, 384 U.S. 563, 583 (1966). (The dissent cites Berger

v. U.S., 255 U.S. 22, 31 (1921), for the proposition that the extrajudicial doctrine discussed in Grinnell is limited to claims of bias which, as here, are based solely upon judicial rulings.)

Here, the discontented litigant seeks review of the failure of the courts below to recuse themselves based on nothing more than their dissatisfaction with the rulings in the case. No other basis, extrajudicial or otherwise, is stated for the proposition that the courts' impartiality might reasonably be questioned. Under this Court's recent and long-standing interpretations of 28 U.S.C. § 455(a), no violation could possibly be found under the facts suggested here, and accordingly, there is no basis in this claim for a grant of certiorari.

CONCLUSION

Petitioners' request for review of the rulings of the Tenth Circuit on writ of certiorari should be summarily denied.

Respectfully submitted,

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